



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** OFFICE OF THE COMMISSION SECRETARY *SW*

**DATE:** May 24, 2012

**SUBJECT:** Comment on Draft AO 2012-20  
(Markwayne Mullin)

Transmitted herewith is a timely submitted comment from Jason Torchinsky and Shawn Sheehy, counsel for the requestor.

Draft Advisory Opinion 2012-20 is on the May 24, 2012 open meeting agenda.

**Attachment**

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May 23, 2012

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Draft Advisory Opinion 2012-20 (Mullin)**

Dear Commission Secretary,

These comments are submitted in response to Draft Advisory Opinion 2012-20 (Mullin), as circulated to the public on May 23, 2012.

We agree with the Commission's draft conclusion in Question #2 that "when Mr. Mullin files electioneering communication reports for the Mullin Companies, he will not be required to disclose the names of the Mullin Companies' customers who paid \$1,000 or more for services rendered since January 1, 2011."

We disagree, however, with the Commission's draft conclusion in Question #1. Courts, and government agencies as well, generally seek to apply the law in a manner that avoids absurd results. If the Commission adopts the prepared draft, Mullin Companies will be forced to file various electioneering communications reports, albeit without any "donor" or "contributor" information, per Question #2. The Mullin Companies' broadcast advertisements will also have to carry BCRA-mandated disclaimers, such as (1) "*Paid for by Mullin Plumbing West Division, Inc. Authorized by Markwayne Mullin*" or (2) "*Paid for by Mullin Plumbing West Division, Inc. Not authorized by any candidate or candidate's committee. [street address, phone number, or web address].*" 11 C.F.R. § 110.11(b)(2) – (3). At the end of the plumbing advertisement, in voice over, or by individual representative on screen, will be one of the following recitations: (1) "*I'm Markwayne Mullin and I approved this ad,*" or (2) "*Mullin Plumbing West Division, Inc. is responsible for the content of this advertising.*" 11 C.F.R. § 110.11(c)(3) – (4). (Because Mr. Mullin appears in Mullin Companies' advertisements, we presume these advertisements are treated as "communications authorized by a candidate" for the purposes of the disclaimer regulations at 11 C.F.R. § 110.11.)

We estimate that the spoken disclaimer on the television advertisement would take approximately three to four seconds to read, which amounts to approximately 10% of a 30-

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second television advertisement. In addition, the required visuals in the television advertisement may interfere with the advertisement's ability to put its cloaing commercial message on the screen. With respect to the required disclaimer for the radio ads, we estimate that the spoken disclaimer will take ten to fifteen seconds of a 60-second advertisement (perhaps up to 25% of the advertisement's total time). This will force dramatic revisions of the content of the commercial advertisement simply to comply with these disclaimer requirements. (We are aware of Advisory Opinion 2007-33 (Club For Growth PAC), and make these observations only to highlight the unreasonableness of applying BCRA's disclaimer requirements to plumbing advertisements.)

In light of the specific facts of this request, no useful government purpose is served by including BCRA-mandated disclaimer along with stand-by-your-ad language at the end of a plumbing advertisement that does not promote, support, attack or oppose any candidate and is consistent with a decade's worth of advertising for the corporation. *See, e.g., Citizens United v. Federal Election Commission*, 130 S. Ct. at 914 (2010) ("The Court has subjected [disclosure] requirements to 'exacting scrutiny'"). Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976) at 64, 66). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68).

For each advertisement that satisfies the statutory definition of an "electioneering communication," Mullin Companies will also have to file an electioneering communication report. For each *plumbing* advertisement reported to the Federal Election Commission on Form 9, the public will be treated to the following information:

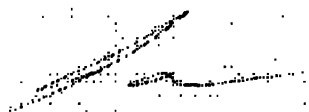
- (1) The name and address of the person making the disbursement;
- (2) The covering period;
- (3) The date of public communication;
- (4) The title of the plumbing advertisement;
- (5) What type of organization the filer is;
- (6) Whether the filer made the disbursement from a segregated account;
- (7) The name and address of the custodian of records;
- (8) Total donations this statement period;
- (9) Total disbursements this statement period;
- (10) The names of all persons exercising or sharing control;
- (11) Reportable donations received;
- (12) Details regarding reportable disbursements made, including
  - a. Name and address of payee, along with employer and occupation;
  - b. Amount of the disbursement to the payee;
  - c. The communication date;
  - d. The purpose of the disbursement;
  - e. The name of the federal candidate referenced in the advertisement that is the subject of the report, along with the office that candidate seeks.
  - f. Whether the disbursement is for the primary, general, or other election.

With respect to *bona fide* plumbing advertisements that do not promote, attack, support, or oppose any federal candidate, absolutely no legitimate purpose is served by filing the information detailed above. When Congress adopted the electioneering communications provisions in BCRA, its purpose was to ban a certain kind of speech – so-called “sham issue ads” run by “unaccountable” groups “hiding behind innocent sounding names.” As audacious as its purpose was, Congress *never* intended to ban, or require any disclosures relating to, *bona fide* commercial advertisements that have absolutely nothing to do with any election.

The draft advisory opinion quotes language from *Citizens United v. FEC*, in which the Supreme Court wrote, “even if the ads only pertain to a commercial transaction, the public has an interest in knowing *who is speaking about a candidate shortly before an election*” (emphasis added). The draft advisory opinion fails to note that the majority was referring to advertisements for *Hillary: The Movie*, which actually were advertisements that spoke about a candidate shortly before an election. The above-quoted language *does not* support the conclusion that a public interest is served through disclosure pertaining to commercial advertisements that do not include anyone speaking about a candidate shortly before an election. In other words, the Supreme Court was not referring to advertisements for plumbing services. Nevertheless, the interest referenced in the above quotation is fully served by Mullin Companies’ advertisements in their current form, where Mr. Mullin appears on screen, introduces himself, and indicates that he is representing Mullin Plumbing. If there is a vital public interest in knowing more about a candidate for public office who speaks about his pre-existing plumbing business in an advertisement, the Commission can be confident that the public will know exactly who is behind these advertisements: Markwayne Mullin and Mullin Plumbing.

BCRA itself authorizes the Commission to exempt, by regulation, defined classes of broadcast communications that do not PASO federal candidates. See 2 U.S.C. § 434f(3)(B)(iv). In Advisory Opinion 2004-31 (Russ Darrow Group, Inc.), the Commission asserted authority to grant exemptions from the literal application of the electioneering communication provisions where such application was deemed unreasonable. We urge the Commission to exercise that authority here, and grant a fact-specific exemption from the electioneering communications provisions to the *bona fide* commercial advertisements of Mullin Companies presented in this Advisory Opinion Request.

Sincerely,



Jason Torchinsky  
Shawn Sheehy  
Counsel to Markwayne Mullin